In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, APPELLANT,
v.
M. R. PENDELL AND JESUS ESCOBAR. } No. 211.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

SANTA TERESA GRANT IN NEW MEXICO.

REPLY BRIEF FOR UNITED STATES.

Only one or two of the positions urged by claimants in their several briefs filed in this cause seem to require a reply. The others, it is believed, are fully covered by the main brief filed by the Government.

1. It is urged (p. 11 of appellees' first brief) that the proceedings of 1852 being found in the office of a judge at El Paso del Norte comply with the treaty requirement to the effect that "grants" must be "duly recorded in the archives of Mexico." A similar position seems to be urged on page 21 of the same brief. It seems sufficient to recall the court's attention to the fact that the proceedings of 1852 are not the proceedings of grant, but are simply *ex parte* proceedings for

its revalidation. Even if these proceedings of 1852 could be considered as "duly recorded" they are not a record of the "grant," but of something entirely different. What is required by the treaty is the presence in the archives of the *expediente* of the original grant and a *toma de razon* of its issuance. The reason for this requirement is discussed in the cases on the subject of a record cited in the Government's main brief. The certified copy of a judicial proceeding instituted sixty years after the alleged date of the grant relied upon is manifestly not the *record* of the executive act, to which the treaty refers. But even considering those proceedings as the grant, their presence in the office of an obscure judge in the outposts of the State of Chihuahua, certainly do not fulfill the treaty requirement that the grant shall be "duly recorded in the archives of Mexico." Such a record is not in "the archives of Mexico" as contemplated by the treaty. The archives there referred to are those at the seat of government, the public records to which the United States, when it acquired the land in controversy, had access, and to which it would and could look to ascertain just what burdens rested upon the domain which it was acquiring by treaty. This provision in the treaty was for the protection of the United States. Certainly to hold that the record the two Governments contemplated was *any* proceeding before any court of first instance in Mexico, is to hold that the provision of the treaty is practically valueless for the purpose intended. It can not be presumed that the United States intended to

stipulate for the recognition of every grant that a judge of the first instance had acted upon and as to which he had recorded a judgment in his office. On the contrary, it is evident that what was intended was that only those claims appearing in the record of executive acts at the seat of government were to be "respected and considered as obligatory." This is clearly indicated by this court in *Bolton's case* (23 How., 350), where it is said:

> Among individuals this certificate [the *titulo*] serves the purpose of evidence. But when the Government institutes inquiries in reference to the subject it is entitled to require the production of *that official record which it has prescribed to its officer, for its own security, and as a necessary condition of a legal administration and a necessary precaution against fraud.*

To the same effect are the other cases quoted on page 68 of the Government's original brief.

2. It is further insisted by claimants (brief, p. 12) that the testimony of the witness Francisco Rascon, taken in the proceedings of 1852, establishes the record of the original grantee. The inefficacy and inadmissibility of this proceeding of 1852 has been urged in the brief heretofore filed by the United States; but acting on the assumption that it has effect as evidence, claimants urge that Rascon's testimony shows that the grant was "duly recorded in the archives of Mexico" because in the certified copy presented to the court the word for archives is, forsooth, spelt with a capital A, and because the word "*empleado*," used to describe the

official position of Rascon's father (in whose office witness says he saw the grant) means a public employee or officer. It is believed that these propositions answer themselves. Omitting a discussion of the matter of orthography involved in the use of a capital letter by the scrivener who made the copy presented, the use of the word "empleado" does not, it is respectfully urged, possess any significance. While that word often means a "public employee," it is also used in other senses. Thus (in "The New Dictionary of the Spanish Language, which includes the last edition of the Spanish Academy") the word *empleado* is defined not only as "a public functionary" but is also stated to be "applicable to those who are employed for an enterprise or a particular purpose, in the discharge of a duty more or less honorable and profitable." It is a matter of conjecture as to the sense in which the word was used by the witness; he may have meant to say that his father was a public officer, or he may not have so intended. But assuming the former, the fact that he saw among the archives in his father's office in El Paso del Norte a paper purporting to be the original of this grant falls very far short of meeting the treaty requirements, especially when it is not made to appear what character of office his father held, and when it is further remembered that Paso del Norte was never the seat of government for New Mexico, so that the original record of the grant could not have been there.

3. It seems to be asserted, however (claimants' brief, p. 23, et seq.), that the treaty of 1853 does not pre-

clude the recognition of unrecorded grants in its statement that such grants "shall not be respected or be considered as obligatory," but that this provision means simply that as to that character of grants the United States shall not be under obligation to extend recognition. It is difficult to see the force of the distinction urged by counsel, especially in dealing with a claim brought under the act of March 3, 1891. It is undoubtedly true that Congress can provide for the recognition of claims, even though barred by the Gadsden treaty, just as it can in its unlimited powers over the public domain make grants *de novo*. But this is a power belonging to Congress, not the Court of Private Land Claims. That court is in terms confined to recognizing only such grants as the United States are *bound* by the provisions of the treaty of cession to respect (subsection 1 of section 13 of the act of March 3, 1891), and the validity of each title presented is to be determined "according to the law of nations and the stipulations of the treaty." (Section 7.)

4. It is further urged (appellees' additional brief in reply, p. 2) that lieutenant-governors had the power under the Spanish system to make grants. The Missouri cases cited to that effect all turn, however, upon the fact that there the lieutenant-governor was also a subdelegate, and by virtue of this office, not that of lieutenant-governor, he was authorized to make inchoate grants (*United States* v. *Chouteau*, 9 Pet., 137; *Delassus* v. *United States*, 9 Pet., 116). Indeed, the

cases just cited show that the lieutenant-governor made the concessions, "*by direction of the governor-general*, at a time when the power of granting land was vested in the governors of provinces." It seems sufficient to say that none of these powers are shown to have existed in the present case. If there was in 1790 a lieutenant-governor of New Mexico at El Paso del Norte, there is no evidence that he was a subdelegate or that he was authorized by the governor to make the grant. The burden of showing such extraordinary powers rests upon claimants. As was said in *Whitney* v. *United States* (181 U. S., 114):

> In that case (*United States* v. *Ortiz*, 176 U. S., 422) it was held that under the provisions of the act establishing the Court of Private Land Claims the burden of showing the existence of the grant was upon the person claiming under it, and that no presumption of authority on the part of the granting officer existed, as in the case of the above-mentioned Territories. This last case was approved in the *Elder case* (177 U. S., 104), where it was again held that the claimant must prove his title by a preponderance of evidence and no presumption of an authority existed.

5. Even if presumptions of power to grant could be entertained under the act of 1891, no presumptions can be indulged upon the present record. The utmost to which this class of presumptions has been extended is as stated in *United States* v. *Clarke* (8 Peters, 452), where it is said that the acts of an officer to whom a public duty is assigned by the King, *within*

the sphere of that duty, are *prima facie* taken to be within his power. The much quoted case of *Strother* v. *Lucas* (12 Pet., 437) goes only to this extent and no further. In that case a grant made by the governor was held good, despite a contrary order from the Crown, because the governor ordinarily had power to make a grant (*United States* v. *Clarke*, 8 Pet., 452–453), and his act, being within the sphere of his duty, was taken to be within his power. Even upon this principle, however, the court was in that case almost evenly divided. The reasoning of that case, however, does not apply in the present case. Here it was not a governor, but a lieutenant-governor acting. No law can be shown to the effect that the making of a grant was within "the sphere of his duty," so that no presumptions obtain in favor of his acts in making a grant.

The rule appliable here is quite clearly stated by the supreme court of Texas in *Jones* v. *Muisbach* (26 Tex., 235), where it is said:

> But this presumption can never be invoked to sustain the acts of an officer outside of or contrary to the usual and well recognized functions and duties of his office. To do so would be to withdraw the acts of such officers entirely from legal scrutiny and constitute their own sense of duty as the sole criterion of their powers, and would in all probability sanction every usurpation of which such an officer might have been guilty. In fact the more gross the usurpation the more difficult would it be for those who should deny the validity of the act to show

> that he had been forbidden to perform it by superior authority. The correct rule, as recognized by this and every other court, unquestionably is that where an officer of well-known, defined, and limited powers performs an act at variance with or beyond the scope of his usual authority the burthen of proving the validity rests upon the party seeking to sustain it. Otherwise the party seeking to overthrow such a presumption would be forced to prove a negative.

6. It is said, however, on page 5 of claimants' additional brief:

> There never was a time when an intendente undertook to grant lands in New Mexico, nor was there ever a time when the governors therein and the *lieutenant-governor at El Paso del Norte did not exercise such right.* Of this the court must take notice.

Counsel produced not a single instance, however, of the making of a grant by a lieutenant-governor at El Paso del Norte, and it is not believed that such a grant can be found. During the writer's connection with this land-grant litigation, extending to several hundred grants in New Mexico and a number in Arizona, he has never found a grant purporting to have been made by a lieutenant-governor at Paso del Norte, or indeed a lieutenant-governor anywhere else, with the exception of four or five grants made in 1735 by Juan Paez Hurtado, lieutenant-governor of New Mexico, in the absence of Governor Cruzat y Gongora in El Paso. Upon every one of these last-named grants, however, is an indorsement of revocation in the same language,

made by Governor Cruzat; and in the several cases brought before the Court of Private Land Claims based upon these revoked grants a decree of rejection has invariably been entered. The opinion in the first of these cases, followed in all the others, is hereto attached as Appendix No. 1. It will be noted that the holders under these grants are stated by Governor Cruzat in his order of November 11, 1735, to be upon the same basis as those "who obtained lands of his majesty without legal title."

So far, therefore, from there being any customary exercise of the power of alienation by lieutenant-governors in New Mexico, that power, so far as is shown by the archives and papers presented to the court below in dealing with this subject, was *never* exercised by them except in a single year, by a single lieutenant-governor, and in that case his exercise of power was promptly repudiated by his superior.

Respectfully submitted.

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APPENDIX NO. 1.

In the Court of Private Land Claims, Santa Fe, New Mexico, August term, 1896.

ANASTACIO C. DE BACA ET AL. *versus* UNITED STATES. } No. 97. Barranca grant.

Opinion of the court delivered by Stone, associate justice, on September 5th, 1896.

This grant was made on the second day of March, 1735, by Juan Paez Hurtado, who represents himself in the granting document to be lieutenant-governor and captain-general of this kingdom, acting as governor in the absence of Senior Col. Don Geronimo y Gongora, governor and captain-general of this kingdom. Possession was given to the grantees, Geronimo Martin, and four others, on the ninth day of the same month and year.

At the foot of the granting document and report of possession is appended the following indorsement: "This grant of lands with the corresponding possession was revoked, note of which was taken in the Government book," and signed "Cruzat."

It is pleaded by counsel for the Government, as well as by the intervenor herein, appearing on behalf of the grantees of the Juan Jose Lobato grant, that the Barranca grant sought to be confirmed in this case is situated and wholly included within the boundaries of

the said Lobato grant, and which latter grant has heretofore been confirmed by decree of this court and the survey thereof made and approved, and this allegation is admitted.

On the part of the defense archive number 524 was admitted in evidence, which recites the order and proclamation of Governor Cruzat y Gongora revoking the grant made by the lieutenant-governor, Hurtado, which order is as follows:

Archive 524.

"In the city of Santa Fe, on the eleventh day of the month of November of the year one thousand seven hundred and thirty-five, I, Colonel Don Gervacio Cruzat y Gongora, governor and captain-general of this kingdom of New Mexico, said that whereas I ordered for good reasons which I had for the same the revocation of the grants of land made by Lieutenant-General Juan Paez Hurtado during the time I was making my visit to the jurisdiction of El Paso, and it having come to my knowledge that Geronimo Martin, a resident of the Villa Nueva de Santa Cruz, is building a house on the lands of the said grant ordered to be revoked, and which has been revoked for some months, and this being to the prejudice of the royal patrimony I ought to order, and I do order, that the said Geronimo Martin shall immediately stop the building of the said house under penalty of one hundred dollars in cash or in money exacted by summary process of law from the most available of his property, which sum I hereby apply in equal parts to the King's treasury and to the expenses of the judiciary, and he shall tear down all that he has built within eight days after he shall have been notified, and I direct that the said lands granted by the said lieutenant-general to the said Geronimo Martin, as well as those granted to others within the said time

and which have been revoked shall be published as crown lands and applied to the royal patrimony, and that the said Geronimo Martin shall be advised that if, with the said term of eight days, he does not tear down all that he may have built upon the said revoked grant all the buildings that he may have erected shall be overthrown and torn down at his expense, and he shall also suffer the penalty prescribed by law for those who obtain lands of his majesty without legal title. Wherefore I ordered all the alcaldes mayores of the jurisdictions in which said grants now revoked were made not to permit in any way or manner that the said grants of land shall be settled by those who obtained the said revoked grants; all of which shall be made public and notorious by the alcaldes mayores of the respective jurisdictions, and they shall place the certificate of the publication of the same at the foot of this order, and this having been done it shall be returned to the superior government where it shall be recorded in conformity with that which I ordered and provided. Thus I provided, ordered, and signed with my assisting witnesses in the absence of a notary public or royal, of which there is none in this kingdom.

Don Gervacio Cruzat y Gongora.

Gaspar Bitton.

Nicolas de Mastis.

In the Villa Nueva de Santa Cruz, on the thirteenth day of the month of November, one thousand seven hundred and thirty-five, I, Captain Juan Estevan Garcia de Noriega, alcalde mayor and war captain of this jurisdiction, in obedience to the foregoing decree, published it to the residents of the same, and to Geronimo Martin on the seventeenth, he being absent at the time down the river, and he having heard and understood, placed on his head and said that he obeyed it

humbly, and in order that it may so appear he signed it with me and my assisting witnesses on the said day, month, and year.

JUAN ESTEVAN GARCIA DE NORIEGA.
GERONIMO MARTIN.

Witness: JOSEPH GARCIA DE NORIEGA.
Witness: MIGUEL CE QUINTANA."

The Lobato grant was made in the year 1740, which recited that the land granted was at that time public domain, and the boundaries specified were the same as those designated in the former grant made to Cristobal Torres in 1724, and which was afterwards revoked in 1733 by Governor Cruzat y Gongora and the tract declared to be Crown lands subject to regrant. The Lobato grant was in consequence of some controversy regranted and confirmed to the grantee, Juan Jose Lobato, in 1744, by Rabal, then governor and captain-general of this province.

In support of claimants' title to the Barranca grant an extract from archive 1100 was introduced in evidence, being a certain proclamation of Don Tomas Veles Cachupin, then governor and captain-general, in the year 1750, reciting that as certain lands theretofore given to families of the villas of Abiquiu, Ojo Caliente, and Embudo had been abandoned and deserted by the inhabitants, they, the said former inhabitants, were directed to return to their lands and houses at once and proceed with the cultivation of their lands. This proclamation was made in February, and prescribed that the people should put in crops that "coming spring," and were to build houses, lay out streets and plazas in a certain designated manner for defense against enemies, etc., but there is no mention of any person or family by name, nor is there any description

of the location of the lands referred to other than the mention of the villas named, nor is there any evidence that such inhabitants complied in any respect with the governor's proclamation.

Another document put in evidence by claimants shows that in 1784 there was an acknowledgment by Juan Bautista de Anza, the then governor of the province of New Mexico, that Don Jose Martin, who is claimed to be a descendant of Geronimo Martin, one of the original grantees under the revoked grant, was entitled to the "ancient lands held by him," and that he and other interested parties were to be protected in "their ancient possession," and this acknowledgment was assented to by the Indians and citizens of the place, but there is nothing to indicate the locality or extent of the lands and possession referred to.

It was contended by counsel for claimants on the hearing that there was no law or authority for the governor to revoke the grant in question, except by a proper proceeding for denouncement.

We think that proceedings for denouncement were only employed in cases where the abandonment of lands granted or other failure of compliance with the conditions of the grant had been formally alleged and presented to the granting authority. In this case the grantee under the lieutenant-governor was in possession, and inasmuch as the governor on his return states in his order of revocation that "I ordered, for good reasons which I have for the same, the revocation of the grants of land made by Lieutenant-General Juan Paez Hurtado, during the time I was making my visit to the jurisdiction of El Paso," and further imposed upon the grantee "the penalty prescribed by law for those who obtain lands of his majesty without legal

title," it may fairly be inferred that the governor based his revocation upon the ground that the grant by his lieutenant was illegally or improvidently made.

We do not deem it necessary to discuss the question whether under a proper construction of certain provisions contained in the act creating this court we have jurisdictional authority to confirm a grant lying within the boundaries of another grant which upon full hearing has been previously confirmed by this court.

It is to be remarked that there is a noticeable difference between the provisions of the act establishing this court and the provisions of the act of 1851 establishing the California commission touching the jurisdiction respecting conflicting titles, and it may well be doubted if the confirmation of the Lobato grant did not determine the title to all the area embraced within its boundaries and exhaust the jurisdiction of the court therein, except as to the Abiquiu and Plaza Blanca grants, which were not opposed by the claimants under the Lobato title.

For the reasons above expressed, the claim in this case is rejected and the petition ordered dismissed.

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